

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

SPENCER F. HOBSON and LINDA A.
HOBSON,

Plaintiffs,

v.

MORTGAGE ELECTRONIC
REGISTRATION SYSTEMS, INC., et al.,

Defendants.

Case No. 3:12-cv-00399-MMD-WGC

ORDER

(Defs.' Motion to Dismiss – dkt. no. 6)

I. SUMMARY

Before the Court is Defendants' Motion to Dismiss. (Dkt. no. 6.) For reasons discussed below, the Motion is denied.

II. BACKGROUND

Plaintiffs Spencer F. Hobson and Linda A. Hobson purchased real property located at 1991 Quail Creek Court, Reno, Nevada 89509 (the "Property"), January 2, 1998, for \$352,000. (Dkt. no. 6-A.)¹ In June 2001, the Hobsons obtained \$48,000 home equity line of credit issued by Homecomings Financial Network, Inc. ("Homecomings"), which was secured by a Deed of Trust. (Dkt. no. 6-B.) The Deed of Trust names

¹The Court takes judicial notice of these public records. See *Disabled Rights Action Comm. v. Las Vegas Events, Inc.*, 375 F.3d 861, 866 n. 1 (9th Cir. 2004) (the court may take judicial notice of the records of state agencies and other undisputed matters of public record under Fed. R. Evid. 201).

1 Homecomings as lender and Standard Trust Deed Service Company ("Standard Trust")
2 as trustee. (*Id.*) Defendants allege that this line of credit was obtained alongside a
3 \$384,000 conventional 30-year loan from Homecomings, but do not append the relevant
4 Deed of Trust detailing the security of that loan.

5 On September 15, 2010, Defendant Mortgage Electronic Registration Systems,
6 Inc. ("MERS") initiated a Substitution of Trustee, substituting Executive Trustee Services,
7 LLC ("Executive Trustee") with the original trustee Standard Trust. (Dkt. no. 6-C.) The
8 Substitution of Trustee was recorded on September 17, 2010.

9 Also on September 15, 2010, Executive Trustee executed a Notice of Default,
10 which was recorded on September 17, 2010. (Dkt. no. 6-D.) The Notice stated that the
11 Hobsons defaulted on obligations under the deed of trust that secured their \$384,000
12 loan beginning on June 1, 2010.

13 A foreclosure mediation was held on May 6, 2011, pursuant to Nevada's
14 Foreclosure Mediation Program. (Dkt. no. 1-A at ¶ 13.) The Hobsons allege that
15 Defendants failed to bring to the mediation the original or certified note, deed of trust,
16 and assignments relating to the Property. (*Id.*)

17 Thereafter, on July 1, 2011, MERS assigned its beneficial interest in one of the
18 deeds dated June 1, 2001, to Deutsche Bank Trust Company Americas as Trustees.
19 (Dkt. no. 6-E.) The Assignment was recorded on July 13, 2011.

20 On July 25, 2011, Executive Trustee issued a Notice of Rescission of Declaration
21 of Default rescinding and withdrawing its Notice of Default. (Dkt. no. 6-F.) The Notice of
22 Rescission was recorded on July 26, 2011.

23 Executive Trustee issued a second Notice of Default on July 25, 2011, and
24 recorded on July 26, 2011. (Dkt. no. 6-G.) This second Notice of Default was issued for
25 failure to pay the same obligations due on June 1, 2010, for the \$384,000 loan.

26 On April 30, 2012, the foreclosure mediation program issued a Certificate
27 indicating that the property was "non-applicable" and allowing the foreclosure to
28 proceed. (Dkt. no. 6-I.) The Certificate was recorded on May 22, 2012.

1 Executive Trustee issued a Notice of Trustee's Sale on May 29, 2012, scheduling
2 a sale of the Property on June 29, 2012. (Dkt. no. 6-J.) The Notice of Sale was
3 recorded on June 1, 2012.

4 The Hobsons thereafter filed the instant action on June 25, 2012, in the Second
5 Judicial District Court for the County of Washoe. (Dkt. no. 1-A.) The Hobsons named
6 MERS, GMAC Mortgage, LLC, and Executive Trustee as Defendants, and allege four
7 causes of action: Document Violation of NRS § 107.086 (Claim 1), Certificate Violation of
8 NRS § 107.086 (Claim 2), Notice of Default Violation of NRS § 107.080 (Claim 3), and
9 Chain of Title Violation of NRS § 107.080 (Claim 4). Defendants removed the action on
10 July 27, 2012. (Dkt. no. 1.)

11 **III. LEGAL STANDARD**

12 A court may dismiss a plaintiff's complaint for "failure to state a claim upon which
13 relief can be granted." Fed. R. Civ. P. 12(b)(6). A properly pled complaint must provide
14 "a short and plain statement of the claim showing that the pleader is entitled to relief."
15 Fed. R. Civ. P. 8(a)(2); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). While
16 Rule 8 does not require detailed factual allegations, it demands more than "labels and
17 conclusions" or a "formulaic recitation of the elements of a cause of action." *Ashcroft v.*
18 *Iqbal*, 556 US 662, 678 (2009) (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)).
19 "Factual allegations must be enough to rise above the speculative level." *Twombly*, 550
20 U.S. at 555. Thus, to survive a motion to dismiss, a complaint must contain sufficient
21 factual matter to "state a claim to relief that is plausible on its face." *Iqbal*, 556 U.S. at
22 678 (internal citation omitted).

23 In *Iqbal*, the Supreme Court clarified the two-step approach district courts are to
24 apply when considering motions to dismiss. First, a district court must accept as true all
25 well-pled factual allegations in the complaint; however, legal conclusions are not entitled
26 to the assumption of truth. *Id.* at 679. Mere recitals of the elements of a cause of action,
27 supported only by conclusory statements, do not suffice. *Id.* at 678. Second, a district
28 court must consider whether the factual allegations in the complaint allege a plausible

1 claim for relief. *Id.* at 679. A claim is facially plausible when the plaintiff's complaint
 2 alleges facts that allow a court to draw a reasonable inference that the defendant is
 3 liable for the alleged misconduct. *Id.* at 678. Where the complaint does not permit the
 4 court to infer more than the mere possibility of misconduct, the complaint has "alleged –
 5 but not shown – that the pleader is entitled to relief." *Id.* at 679 (internal quotation marks
 6 omitted). When the claims in a complaint have not crossed the line from conceivable to
 7 plausible, the complaint must be dismissed. *Twombly*, 550 U.S. at 570.

8 A complaint must contain either direct or inferential allegations concerning "all the
 9 material elements necessary to sustain recovery under *some* viable legal theory."
 10 *Twombly*, 550 U.S. at 562 (quoting *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101,
 11 1106 (7th Cir. 1989) (emphasis in original)).

12 **IV. DISCUSSION**

13 The Hobsons bring four distinct defective foreclosure claims.² Nevada law
 14 provides that a Deed of Trust is an instrument that may be used to "secure the
 15 performance of an obligation or the payment of any debt." NRS § 107.020. Upon
 16 default, the beneficiary, the successor in interest of the beneficiary, or the trustee may
 17 foreclose on the property through a trustee's sale to satisfy the obligation.
 18 NRS § 107.080(2)(c).

19 "NRS § 107.080 and NRS § 107.086 set out certain procedures that must be
 20 followed before a trustee may execute the power of sale, and if these procedures are not
 21 substantially complied with, the sale may be declared void." *Elliot v. JPMorgan Chase*
 22 *Bank., N.A.*, No. 3:11-cv-826-RCJ-VPC, 2012 WL 1682039, at *4 (D. Nev. May 11,
 23 2012) (citing NRS § 107.080(5)(a)).

24 To commence a foreclosure, the beneficiary, the successor in interest of the
 25 beneficiary, or the trustee must execute and record a notice of default and election to

27 ²They do not allege the common law wrongful foreclosure claim, which, as the
 28 Defendants point out, requires an allegation that they are able to tender the amount due.

1 sell. NRS § 107.080(2)(c). A copy of the notice of default and election to sell must be
 2 mailed by registered mail or certified mail with return receipt requested. *Id.* at §
 3 107.080(3). The trustee or other person authorized to make the sale must wait at least
 4 three months after recording the notice of default and election to sell before the sale may
 5 proceed. *Id.* at § 107.080(2)(d). After the three-month period, the trustee must give
 6 notice of the time and place of the sale to each trustor by personal service or by mailing
 7 the notice by registered or certified mail to the last known address of the trustor. *Id.* at §
 8 107.080(4)(a). Under NRS § 107.080(5), a “sale made pursuant to this section may be
 9 declared void by any court of competent jurisdiction in the county where the sale took
 10 place if . . . [t]he trustee or other person authorized to make the sale does not
 11 substantially comply with the provisions of this section.” *Id.* at § 107.080(5)(a). A
 12 nominee on a Deed of Trust has the authority, as an agent, to act on behalf of the holder
 13 of the promissory note and execute a substitution of trustees. *Gomez v. Countrywide*
 14 *Bank, FSB*, 2009 WL 3617650, at *1 (D. Nev., Oct. 26, 2009). As long as the note is in
 15 default and the foreclosing trustee is either the original trustee or has been substituted
 16 by the holder of the note or the holder’s nominee, there is no defect in the Nevada
 17 foreclosure. *Id.* at *2.

18 In this case, Defendants have failed to demonstrate a proper chain of foreclosing
 19 entities. First, Defendants have not appended the Deed of Trust that secures the
 20 Hobsons’ \$384,000 refinanced loan. The Court cannot determine who the original
 21 lender, trustee, or beneficiary was in the absence of this document. It is not clear, based
 22 on the judicially noticeable documents, how MERS claimed the authority to substitute
 23 Executive Trustee, thus calling into question the entire chain of foreclosure.


24 Second, the Hobsons allege that they did not receive the second Notice of Default
 25 executed on July 25, 2011. (See dkt. no. 1-A at ¶ 28.) Although the foreclosing entity is
 26 under no obligation to ensure the notice of default was actually received by the borrower,
 27 it is under an obligation to mail the notice. See *Hankins v. Adm’r of Veterans Affairs*, 555
 28 P.2d 483, 484 (Nev.1976) (statute only requires mailing notices). The Court declines to

1 consider documents not in the public record or properly the subject of judicial notice,
2 including affidavits of mailing attached by Defendants.

3 **V. CONCLUSION**

4 Accordingly, the Hobsons have stated a plausible claim for relief, and Defendants'
5 Motion (dkt. no. 6) is DENIED.

6 DATED THIS 4th day of February 2013.

7
8 
9 _____
10 MIRANDA M. DU
11 UNITED STATES DISTRICT JUDGE
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28